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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PETER SEKINOFF,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

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Neal, Stratford & Kerr, S. F. 20070

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STATEMENT OF THE CASE.

An indictment was returned against the plaintiff in error at Juneau, Alaska, on October 11, 1921, charging that

> "The said Peter Sekinoff, at or near Juneau, within the said District of Alaska, and within the jurisdiction of this Court, on the first day of July, in the year of our Lord one thousand nine hundred and twenty-one, did, the said Peter Sekinoff being then and there over the age of sixteen years, knowingly, wilfully, wrongfully, unlawfully, feloniously carnally know and abuse Sonia Malachoff, the said Sonia Malachoff being

then and there a female person and then and there under the age of sixteen years; to-wit, of the age of eleven years, and the said Peter Sekinoff not being then and there the husband of said Sonia Malachoff."

Said indictment was brought under Sec. 1894, Compiled Laws of Alaska, 1913, which section reads as follows:

"Sec. 1894. That whoever has carnal knowledge of a female person, forcibly and against her will; or, *being sixteen years of age, carnally knows and abuses a female person under sixteen years of age, with her consent, is guilty of rape.*"

Section 1895, Compiled Laws of Alaska, reads as follows:

"Sec. 1895. That a person convicted of rape upon his daughter, or sister, *or a female person under twelve years of age, shall be imprisoned in the penitentiary during life;* and a person convicted of rape upon any other female person shall be imprisoned in the penitentiary not more than twenty years nor less than three years."

Section 2269, Compiled Laws of Alaska, reads as follows:

"Sec. 2269. That in all cases the defendant may be found guilty of any crime, the commission of which is necessarily included in that with which he is charged in the indictment, or of an attempt to commit such crime."

Section 1898, Compiled Laws of Alaska, reads as follows:

> "Sec. 1898. That whoever assaults another with intent to kill, *or to commit rape* or robbery upon the person so assaulted, shall be imprisoned in the penitentiary not more than twenty years nor less than one year."

The evidence in the case shows the plaintiff in error (defendant in Court below) is a Russian, from the Black Sea region, who has been in the United States for many years (Transcript page 113); that his victim was at the time of the commission of the crime but eleven years old (Transcript p. 5); that her father is a hard-working, respectable native of Alaska, of Russian extraction, who had met with a series of misfortunes (Transcript pp. 80-81); that her mother had been ill and is a person of violent temper and feared by her children (Transcript pp. 74-78), but of good moral character, so far as this record reveals; that said Malachoff family consisted of the parents and seven children, including the eleven-year-old girl, Sonia.

The evidence further shows that the plaintiff in error became acquainted with said Malachoff family some time in the fall of the year 1920; that he almost immediately began ingratiating himself with said Malachoff family by offering them financial assistance; by offering to set the father, S. M. Malachoff, up in the mercantile business; by offering to assist him in developing his mining claim; by offering to take him into partnership on a wood-cutting contract, and in other ways; that said S. M. Malachoff

and his wife finally did borrow $500 from plaintiff in error (Transcript pp. 86 and 45). The evidence further shows that during all of his acquaintanceship with the Malachoff family the plaintiff in error was particularly attentive to the said Sonia Malachoff; that he gave her presents, took her for walks and a trip to Treadwell, entertained her by taking her to cafes for meals, and contrived upon various pretexts to have her visit him at his cabin; that he persistently tried to get the girl away from her parents and into his custody, by offering to take her away to school, insisting upon her going to the woods with him on the wood-cutting trip, and in other ways, as the evidence shows.

Sonia Malachoff, the victim of this assault, told a simple, straightforward, convincing story. She told how the plaintiff in error would arrange for her to visit his cabin upon one excuse or another; how, if she were accompanied by her younger sister, the plaintiff in error would give the younger sister money and send her away to buy candy; how plaintiff in error would then take Sonia upon his lap and kiss her, feel of her body; how he would take out his penis and have her hold it; and how finally, on or about the 21st day of May, 1921, plaintiff in error got the mother's permission for Sonia to visit his cabin for the purpose of writing a letter for him; how he sent the younger sister away for candy, locked his door and then took Sonia on his lap and had her handle his privates. She described how he

laid her upon his bed, unfastened her clothing and proceeded to accomplish his purpose. She testified that he penetrated her body about one inch; that she cried from the pain, and that plaintiff in error put his hand over her mouth; that there was an emission of "something like hot water" from his body to hers. Whether there was an actual coition or whether the emission was caused by his passionate excitement, superinduced by her preliminary handling of his privates, was a question of fact for the jury to determine.

The girl Sonia then went on to explain how plaintiff in error wiped her off with a handkerchief and impressed her with the idea that it would be dangerous for her to tell her mother of what had happened. Sonia then told how plaintiff in error, on five subsequent occasions, attempted to have intercourse with her, but desisted each time when she cried.

This story is corroborated by the testimony of Mrs. A. P. Kashevaroff, President of the Board of Children's Guardians. The testimony of Mrs. Kashevaroff (Transcript, pp. 75 et seq.) is to the effect that she had observed an intimacy between plaintiff in error and the girl Sonia Malachoff; that when the girl went to Mrs. Kashevaroff's house on an errand, she took advantage of the opportunity to question her as to what had occurred between her and plaintiff in error. By rigid questions (Transcript, p. 76), she drew a confession from the girl that plaintiff in error had been in the habit of taking

the girl upon his lap and kissing her, feeling her person and putting her upon his bed and handling her body.

The evidence is that during the times when the assault was made in May, 1921, Sonia's mother was sick in the hospital and her father was away from home during the day, engaged in work. Mrs. Kashevaroff testified that she did not tell Mrs. Malachoff what Sonia had told her because Mrs. Malachoff was sick, but she did tell the husband, Mr. Malachoff, who testified that he did not mention the matter to his wife because of her physical condition. (Transcript, p. 42.)

Mrs. Malachoff testified that during the time she was confined to her bed with sickness, there had been an accumulation of soiled clothing of the children. Then when she got on her feet sometime in July (Transcript, p. 85) she examined this pile of soiled clothing, with a view to washing it, and, upon inspection of a union suit belonging to Sonia she found the garment stained with "blood and that yellow stuff that comes from a man." (Transcript, p. 86.)

Mrs. Malachoff then went on to testify, without objection by plaintiff in error or his attorney, that she asked Sonia if any man had been intimate with her and, if so, what man; that Sonia acknowledged what had happened to her and said plaintiff in error had done it. Then, after telling her husband what had happened, she took the girl and went to the house of plaintiff in error and asked him if what

Sonia had told her was true. Plaintiff in error denied that he had raped the girl, but he did say (Transcript, p. 87): "Well, maybe I was touching her and feeling her, and I didn't hurt her." Then, in the presence of plaintiff in error, Mrs. Malachoff said to Sonia, "Tell me how he did it to you," and Sonia laid down across the bed to show how he did it, and he took hold of her and said, "Don't show it to mamma; mamma's too weak; she might get sick." Then she told plaintiff in error that she was going to report him to the court and he threatened that if she reported him he would kill her and all of her family when he got out of jail.

Within a few hours, plaintiff in error sent an attorney to demand of the Malachoffs that they pay him the money he had loaned to them.

All of the evidence of Mrs. Kashevaroff and Mrs. Malachoff was corroborative of the evidence of Sonia Malachoff, was material and was not objected to by plaintiff in error or his attorney. The admissions of plaintiff in error to Mrs. Malachoff were particularly material.

ARGUMENT.

Counsel for plaintiff in error sets up as his first specification of error:

> "Insufficiency of the evidence to justify the verdict and that the verdict is against the law."

In support of that specification, he contends that the only witness connecting the plaintiff in error

with the crime charged is the prosecuting witness, Sonia Malachoff, and that the jury "utterly failed to accept her story as true."

In the first place, the testimony of both S. M. Malachoff and Mrs. S. M. Malachoff connects the plaintiff in error with the crime charged. They testified to his repeated efforts to get the girl away from her parents and into his custody, of his taking her to a photographer and having her picture taken with him, and of his taking her on his lap and kissing her. All showing his lascivious disposition toward the prosecuting witness.

The testimony of Sonia Malachoff, as hereinbefore stated, left abundant room for a reasonable doubt as to whether or not plaintiff in error actually had coition with her on or about the 21st day of May, or assaulted her with that intent. If any reasonable doubt existed in the minds of the jury as to whether the defendant was guilty of the crime charged, or of a lesser degree, or of an included crime, it was their duty to resolve the doubt in favor of the defendant and find him guilty of the lesser degree or included crime.

It is urged that the prosecuting witness, Sonia Malachoff, testified that the defendant had made six subsequent and separate criminal assaults upon her. The Court properly instructed the jury in his Instruction No. IX (Transcript, p. 152) that "this evidence was received only as in a way corroborative of

the testimony of the girl as to the act charged and as being one of the circumstances surrounding the case and to assist you in determining the probability or improbability of her statements in regard to the crime charged, and for no other purpose, and you should not regard or consider such evidence for any purpose other than that for which it was admitted."

Counsel for plaintiff in error strongly urges as his principal ground that the verdict in this case is against the law; that the crime of assault with intent to commit rape is not an included crime under this indictment, to-wit: statutory rape, upon a female under sixteen years of age.

Section 1894, *supra,* defining the crime of statutory rape, and Section 1898, *supra,* defining the crime of assault with intent to commit rape, are a part of one Act of Congress, viz: the Criminal Code of Alaska, approved March 3, 1899. These two sections were borrowed bodily from the Oregon code.

The doctrine that assault with intent to commit rape is an included crime, under the Oregon statutes, in an indictment for statutory rape, is well stated and settled in the Oregon case of *State v. Sargent* (49 Pac. 889). Judge Wolverton, in passing upon this point and commenting upon the identical statutes under which the verdict in the case at bar was found, said:

> "We will notice but one other assignment, as the case must go back, and the other questions

urged here are not likely to arise upon a retrial. It is strenuously urged by the counsel for the defendant that there can be no assault with intent to commit rape where the female consents, even though she be under the age of 16 years. The statutory crime of rape is thus defined: 'If any person over the age of sixteen years shall carnally know any female child under the age of sixteen years, or any person shall forcibly ravish any female such person shall be deemed guilty of rape.' Section 1733, Hill's Ann. Laws Ore., as amended (see Sess. Laws 1895, p. 67). Section 1740, Hill's Ann. Laws Ore., provides for the punishment of any person found guilty of an assault with intent to commit a rape. It is the theory of counsel that these sections of the statute do not fix the age of consent, except as it pertains to carnal knowledge; in other words, that if the act of carnal knowledge has been consummated with the consent of a female under the age of 16 years, it would make no difference whether she consented or not, the crime of rape would nevertheless be the result of such coition; but not so with an assault with intent to commit the crime, as the statute has not fixed the age of consent with reference to that offense. In this we cannot concur. It is rape for a person above the age of 16 years to carnally know any female child under that age, and this without the use of force. Now, when the legislature established the additional crime of assault with intent to commit a rape, it evidently had in view the crime of rape as defined by the original section 1733, of which the present is amendatory. In fact, both sections were enacted at one and the

same time, and should, under a well-settled rule, be interpreted in *pari materia*. Hence the word 'rape,' as used in the latter section, must be deemed to have been used in the sense in which it is defined by the former, and it must be taken as if its definition is read into the latter section. In this view of the matter there is no difficulty in reaching the conclusion that non-consent of a female child under the age of 16 years when assaulted by a person above that age with intent to commit a rape is no more an essential or an ingredient of the one crime than the other. One involves the completed act, the other the intent to consummate such a purpose; and if consent is immaterial upon a charge of committing the completed act, which necessarily includes an assault, no reason exists why it should not be so upon a charge of an assault with intent to accomplish the same purpose. Com. v. Roosnell (Mass.), 8 N. E. 747. The law has determined that a female child under the age denominated is incapable of consenting. It is as though she had no mind upon the subject, no volition pertaining to it. There is a period in child life when in reality it is incapable of consenting, and the legislature has simply fixed a time, arbitrarily, as it may be, but nevertheless wisely, when a girl may be considered to have arrived at an age of sufficient discretion, and fully competent to give her consent to an act which is a palpable wrong, both in morals and in law. Under these conditions, while a girl may give her formal and apparent consent, yet in law she gives none. The evidence of such consent is withheld, and rendered wholly incompetent for

> the establishment of such a fact, as in law the fact itself does not exist. Looking at the question in this light, it is easy to comprehend the legal and logical conclusion that an assault with an intent to commit a rape is as much without the consent of a girl under the age of 16 years, although she formally yields concurrence, as that the commission of rape is without her consent under like circumstances. This conclusion is supported by many cases, and we believe it to be the better doctrine, although some authorities are to be found on the contrary. (Citing authorities.)

Also, see:

State v. Blythe, 58 Pac. 1108;
Boyd v. State of Georgia, 74 Georgia Reports 356;
People v. Abbott, 37 Am. St. Rep. 360;
Campbell v. People, 34 Mich. Rep. 351;
People v. McDonald, 9 Mich. 149;
State v. Cross, 79 Am. Dec. 518;
Glover v. Commonwealth, 10 S. E. 420;
Hutto v. State, 53 So. 809;
Burton v. State, 62 So. 394.

A decided weight of the authorities is to the effect that an indictment alleging statutory rape without alleging force is sufficient to sustain a verdict of assault with intent to commit rape upon a consenting female under the age of consent, consent or want of consent being immaterial, the law resists for her. Assault with intent to commit rape is necessarily included in statutory rape. There could be no crime under the statute without an assault.

In the very well considered case of *Walters v. United States* (222 Fed. 892) this Court held:

> "It is the rule established by the decided preponderance of the authorities and by sound reason that in the case of an assault to commit rape upon a female under the age of consent it is not necessary to prove want of consent, for the reason that in law she cannot consent to such an assault. Cyc., 1434; Bishop's New Criminal Law, par. 1120; State v. Sargent, 32 Or. 110, 49 Pac. 889; People v. Roach, 129 Cal. 33, 61 Pac. 574; State v. Johnson, 133 Iowa 38, 110 N. W. 170; Commonwealth v. Roosnell, 143 Mass. 32, 8 N. E. 747; Liebscher v. State, 69 Neb. 395, 95 N. W. 870, 5 Ann. Cas. 351."

> "One who attempts to have intercourse with a female under the age of consent is guilty of an attempt to rape notwithstanding her actual consent. It has also been held in most jurisdictions that there may be an assault with intent to rape upon a consenting female where she is under the age of consent, on the ground that in law she cannot consent to such an assault." (33 Cyc., 1434.)

Lee v. State, 122 Pac. 1111-1114 (citing Cyc.);
Sanders v. State, 112 S. W. 938;
Hightower v. State, 143 S. W. 1168;
Fowler v. State, 148 S. W. 576;
Callaghan v. State, 155 Pac. 308;
DeLeon v. State, 187 S. W. 485;

> "An assault usually implies force by the assailant and resistance by the assailed. If, however, the latter is made incapable of consent, the

act may constitute an assault although she did not resist, but, on the contrary, assented." (22 R. C. L., 1232.)

"Where a connection with a female child under the age of consent is considered as rape, it is almost universally held that an attempt to have such connection is an assault with intent to commit rape, the consent of the child being wholly immaterial." (22 R. C. L., 1233.)

People v. Verdegreen, 39 Pac. 607.
Commonwealth v. Murphy, 42 N. E. 504;
Liebscher v. State, 95 N. W. 870.
State v. Fugita, 129 N. W. 360;
Taylor v. State, 97 S. W. 94.

Continuing, 22 R. C. L., Sec. 71, page 1233:

"The consent of such an infant being void as to the principal crime, it is equally so in respect to the incipient advances of the offender."

State v. Pickett, 11 Nev. 255, 21 Am. Rep. 754 (stating reasons but holding otherwise). This case is quoted by appellant.

In the case of *State v. Pickett,* 11 Nev. 255, 21 Am. Rep. 754, cited by appellant in the case at bar, and cited and approved in *State v. Aken* (cited by appellant), 143 Pac. 795, the Court states reasons contrary to appellant's proposition, but decides otherwise. The Court in *State v. Pickett* says:

"Thus in the case of Hays v. The People, 1 Hill 352, where the precise question here involved was under discussion, Judge Cowen, de-

livering the opinion of the court said: 'The assent of such an infant being void as to the principal crime, it is equally so in respect to the incipient advances of the offender. That the infant assented to or even aided in the prisoner's attempt, cannot, therefore, as in the case of an adult, be alleged in his favor any more than if he had consummated his purpose.' "

In R. C. L., page 1233, Sec. 71, *supra,* the authors say:

> "There are, however, decisions to the effect that an attempt to commit rape can never constitute an assault when the female actually consents to what is done, whether she is within the age of consent or not"—

and cites *State v. Pickett, supra,* and *Smith v. State,* 12 Ohio St. 466, 80 Am. Dec. 355. The latter Ohio case is cited in *State v. Pickett, supra.* Continuing, the authors of R. C. L. say:

> "These cases were decided on the authority of English cases which hold that in a prosecution for an assault with intent to have carnal knowledge of a girl under the age of consent, it is a good defense that the girl consented."

However, the authors of R. C. L. further say, in the same paragraph:

> "Where a connection with a female child under the age of consent is considered as rape, it is almost universally held that an attempt to have such connection *is an assault with intent to commit rape, the consent of the child being wholly immaterial."* (Citing authorities.)

So that a comparison of authorities conclusively shows that the conclusion reached in *People v. Aken*, 143 Pac. 795, and *State v. Pickett*, 11 Nev. 255, 21 Am. Rep. 754 (stating reasons but deciding otherwise) cited by appellant are decidedly against the weight of authority.

> "One charged with the crime of rape by having sexual or carnal knowledge of a female child under the age of 14 years may if the evidence authorizes, be convicted of the offense of ASSAULT WITH INTENT TO RAPE. The girl alleged to have been raped in this case being 13 years of age, and the evidence only authorizing and the state only asking a conviction of assault with intent to rape, it was not error for the court to give in charge to the jury the act of the Legislature (Georgia Laws 1918, p. 259) which fixes the age at which female children may consent to acts of sexual intercourse. THE CRIME OF ASSAULT WITH INTENT TO RAPE is committed when a man undertakes to have sexual intercourse with an unmarried female child under the age of 14 years, by attempting to insert his private parts into her private parts, and where penetration of the vagina is not made only because force sufficient is not used, EVEN THOUGH THE CHILD MAY HAVE CONSENTED TO THE ATTEMPTED SEXUAL INTERCOURSE. Judgment confirmed."
>
> *Suggs v. State*, 100 S. E. 778.

> "The respondent was charged with having, on the 4th day of June, 1918, committed the crime of statutory rape upon Anna Jaracz, a fe-

made of the age of 15 years. He was convicted of ASSAULT WITH INTENT TO COMMIT SUCH CRIME, and on November 1, 1918, sentenced to Jackson prison for a maximum period of ten years and a minimum of five years. Error is alleged on that portion of the instructions in which the court defined the lesser offenses included in the crime charged, viz., assault with intent to commit rape and assault and battery, and instructed the jury that they might convict of either of these in the event that they found the respondent not guilty of the crime charged. But the crime of which respondent was convicted is included in that with which he was charged. It was the duty of the court under our repeated decisions to so charge. Hall v. People, 47 Mich. 636, 11 N. W. 414; People v. Abbott, 97 Mich. 484, 56 N. W. 862, 37 Am. St. Rep. 360; People v. Ryno, 148 Mich. 137, 111 N. W. 740. A similar question was raised in People v. Miller, 96 Mich. 119, where at page 120 (55 N. W. 675) it is said: 'It is true that upon this record the proof upon one side shows the completed act of sexual intercourse with a girl under the age of 14 years, while upon the other a denial of any offense is made. Under such proof it cannot be denied that a verdict of assault with intent to rape is illogical. But *an assault with intent to commit rape is necessarily included in every rape.* The defendant's counsel are alleging, not an injurious error, but one which, if it could be called an error, has resulted to defendant's advantage.''

People v. Martin, 175 N. W. 233 (Mich.) 1919.

A charge of statutory rape includes the offense of assault with intent to commit rape without force.

"The defendant was informed against for the crime of rape, alleged to have been committed upon a female under the age of 16 years, and upon his trial under such information was convicted of the crime of 'ASSAULT WITH INTENT TO COMMIT THE CRIME OF RAPE.' The particular kind of rape charged by the information was that defined by subdivision 1 of section 261, Penal Code, as follows: 'Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, * * * (1) where the female is under the age of sixteen years.' It is not disputed, of course, that in such a case neither force nor violence is essential to the commission of the crime of rape, or that it is immaterial that the act of sexual intercourse was with the full consent of the female. SHE IS BELOW THE AGE OF CONSENT, AND, AS IT HAS BEEN PUT, 'THE LAW RESISTS FOR HER.' People v. Roach, 129 Cal. 34, 61 Pac. 574. In view of this well established rule, it is now so firmly settled in this state as to be no longer open to question that one who lays his hands upon such a female, with the intent and for the purpose, then and there, to accomplish an act of sexual intercourse with her, is by so doing guilty of an *assault with intent to commit rape*, even though he does not use or intend in any event to use any force or violence, and the female in fact offers no resistance whatever, or even expressly consents to all he does. The offense is complete when he has thus

laid his hands upon her with the intention of then and there accomplishing such purpose, and it is entirely immaterial that he subsequently voluntarily desists, without accomplishing his purpose. As said in People v. Courier, 79 Mich. 366, 44 N. W. 571, quoted approving in People v. Roach, *supra:* 'In cases of this kind it is not necessary that it shall be shown * * * that the accused intended to gratify his passion in all events. If he intended to have sexual intercourse with the child, and took steps looking toward such intercourse, and laid hands upon her for that purpose, although he did not mean to use any force, or to complete his attempt if it caused the child pain, and desisted from his attempt as soon as it hurt, he yet would be guilty of an ASSAULT WITH INTENT TO COMMIT THE CRIME CHARGED IN THE INFORMATION.' The following cases in this state support the conclusions we have stated: People v. Johnson, 131 Cal. 511, 63 Pac. 842; People v. Vann, 129 Cal. 118, 61 Pac. 776; People v. Roach, 129 Cal. 33, 61 Pac. 574; People v. Gomez, 118 Cal. 326, 50 Pac. 427; People v. Lourintz, 114 Cal. 628, 46 Pac. 613; People v. Vardegreen, 106 Cal. 211, 39 Pac. 607, 46 Am. St. Rep. 234; People v. Gordon, 70 Cal. 467, 11 Pac. 762. The rule enunciated in such cases as People v. Fleming, 94 Cal. 308, 29 Pac. 647, is not applicable where the female is under the age of consent. It necessarily follows that the offense of ASSAULT WITH INTENT TO COMMIT RAPE IS INCLUDED IN SUCH A CHARGE OF RAPE AS WAS MADE BY THE INFORMATION IN THIS CASE. Judgment affirmed. Dis-

senting opinion by Melvin, J., but not on this point."

People v. Babcock, 117 Pac. 549.

"The indictment charged that on May 16, 1919, 'one Joe Pittman, late of Bryan county, did unlawfully and feloniously in and upon one Eula Yancey, a female under the age of 14 years, make an assault, and with her, the said Eula Yancey, he, the said Joe Pittman, then and there did have sexual intercourse, she the said Eula Yancey not being the wife of him, the said Joe Pittman, contrary to,' etc. ON HIS TRIAL THE DEFENDANT WAS FOUND GUILTY OF ASSAULT WITH INTENT TO COMMIT RAPE. The court said: In the case of Lee v. State, 7 Okl. Cr. —, 122 Pac. 1111, it is said: 'The prosecutrix, being under the age of consent, was conclusively incapable of legally consenting to an assault with intent to have carnal knowledge of her. Every attempt to commit a felony against the person involves an assault, and if the acts of the defendant, done in furtherance of a purpose to have carnal knowledge of the prosecutrix, constituted an assault to commit rape, if done without her consent, THEN NO ACT OF HERS COULD WAIVE SUCH ASSAULT. That there may be an assault with intent to rape upon a consenting female, where she is under the age of consent, on the ground that in law she cannot consent to such an assault, is held in the following cases: (Citing numerous cases). Where the *proof* is not conclusive as to consummation of penetration, and the *proof* is evident as to assault with intent to commit rape, it is the duty of the trial

court to instruct the jury of their right to convict of the lower offense." Vickers v. U. S. 1 Okl. Cr. 452, 98 Pac. 467.

Pittman v. State, 126 Pac. 696 (Oklahoma).

"Appellant in his brief says: Only one question will be argued in this brief. Briefly stated it is: 'Will an affidavit charging rape on a female child under the age of 16 years, which does not in terms contain a charge of assault and battery, support the verdict and judgment of GUILTY OF ASSAULT AND BATTERY WITH INTENT TO COMMIT RAPE?' The answer to appellant's question will therefore be decisive of this appeal. It has been repeatedly held that every charge of rape necessarily includes a charge of an assault and battery. Mills v. State, 52 Ind. 187; Murphy v. State, 120 Ind. 115, 22 N. E. 106; Richie v. State, 58 Ind. 355; Ewbank's Indiana Criminal Law, No. 771. Counsel for appellant insists that the above rule of law does not apply here for in this case the female was under the age of 16 years, and while she could not consent to the rape, she might consent to the assault and battery; and therefore, in order to support the verdict in this case, the affidavit should have charged that the carnal knowledge WAS FORCIBLY HAD. *In Polson v. State,* 137 Ind. 519, 35 N. E. 907, this court said: 'It is impossible to conceive of a rape without an assault and battery for that purpose. The crime of rape necessarily includes an assault and battery with intent to commit a rape."

Gordon v. State, 98 N. E. 627 (Indiana).

The question raised by appellant was decided against his contention in the case of *Hanes v. State*, 115 Ind. 112, 57 N. E. 704. In the course of the Court's opinion in this case it says, on page 120:

> "The point of insistence is that there can be no assault and battery where it is perpetrated *with the consent of the person assaulted* * * * When perpetrated against a female child under 14 years of age, *consent or nonconsent forms no element of the crime.* The crime is the same whether committed forcibly and against the will or with the voluntary submission of the child. In either case it is a felony. Furthermore, any touching of the person of a female child under the age of 14 years, with intent to perpetrate upon her the act of sexual intercourse, is, and necessarily must be, in legal contemplation without her consent, for *she can give no consent that will make the act lawful.* Hence any indecent liberties taken of the person of the child in the prosecution of that intent and purpose is unlawful, and rude and insolent, to say the least of it, and clearly within the definition of assault and battery."

The affidavit is sufficient to support the verdict of the jury.

And *Beverley v. State*, 98 N. E. 628, affirms the case of *Gordon v. State, supra.* The Court said:

> "The questions involved in this appeal are the same as those considered in Harry Gordon v. State of Indiana (1912), No. 22, 125, 98 N. E. 627, and for the reasons therein stated

> the judgment appealed from * * * finding the appellant guilty as charged, is hereby affirmed."

It is contended by appellant that the prosecuting witness by her consent is an accomplice as in adultery or incest cases, referred to by appellant. There is no similarity between adultery and incest cases and rape, even though the female actually consented. The victim of a rape is never an accomplice (16 C. J., 683), although the female actually consents, if she is under the age of consent. The reference of counsel for plaintiff in error to adultery and incest cases is misleading and is not the law.

> "The victim of rape is *never an accomplice,* the rule in this respect being the same whether the crime is committed by force, or against the will of the female, or by fraud, or consisted of carnal knowledge of a female under the age of consent, *although she actually consented thereto.*"

Therefore, it is not necessary that the testimony of the prosecuting witness, Sonia Malachoff, be corroborated. See *State v. Knighten,* 64 Pac. 867, in which the Court says:

> "It is also contended that there is no evidence corroborating the testimony of the prosecutrix. But in a case of this character the uncorroborated testimony of the prosecutrix is sufficient to sustain a conviction, because she is in no sense an accomplice."

See, also,

> 16 C. J., 683, and authorities cited in notes.

Appellant contends that the Court should have given instructions defining other included crimes, to-wit, assault and battery and simple assault, and attempt. Yet he takes the other horn of the dilemma by alleging an exception taken *nunc pro tunc* on the 22nd day of November, 1921, more than a month after the verdict was returned, and not in the presence of the jury, that the Court erred in refusing to give defendant's requested instruction that the jury could not return a verdict finding the defendant guilty of assault with intent to commit rape, *or assault* (Transcript, p. 162. There is no evidence of the crime of simple assault, and where there is no evidence tending to prove the commission of a lower offense, that is, where the evidence shows that the accused is guilty of the higher offense, or not guilty of any, an instruction on the lower offense is not necessary and is properly refused.

> 16 C. J., page 1224, Sec. 2452, and authorities cited thereunder.

There cannot be assault and battery or assault with consent of the person assaulted even though such person be a minor. But a female under the age of 16 years cannot consent under a charge of statutory rape or assault with intent to commit statutory rape, and the charge of assault or assault and battery is not an included crime under an indictment for statutory rape or assault with intent to commit rape upon a female under the age of con-

sent. As to an instruction for attempt to commit rape, it may be said that no attempt to rape a female under the age of sixteen years could be made without an assault, and attempt to rape such a female is not an included crime under an indictment for statutory rape. Attention is also called to Section 1895, C. L. A., *supra*, providing a life penalty for rape upon a child under twelve years of age. Section 2073, C. L. A., provides that the penalty for an attempt shall be one-half the penalty provided for the crime attempted. Said Section 2073 reads as follows:

> "That if any person attempts to commit any crime, and in such attempt does any act toward the commission of such crime, but fails, or is prevented or intercepted in the perpetration thereof, such person, when no other provision is made by law for the punishment of such attempt, upon conviction thereof, shall be punished as follows:
>
> "First. If the crime so attempted be punishable by imprisonment in the penitentiary or county jail, the punishment for the attempt shall be by like imprisonment, as the case may be, for a term not more than half the longest period prescribed as a punishment for such crime.
>
> "Second. If the crime so attempted be punishable by fine, the punishment for the attempt shall be by fine not more than half the amount of the largest fine prescribed as a punishment for such crime."

Where the penalty under the indictment is life, as in the case at bar, Section 2073, C. L. A. would reduce a verdict of attempt to commit the crime to an absurdity. However, if one-half the life of the prisoner could be determined, and the expectancy of a man forty-five years of age be placed at fifteen years. his sentence would necessarily be greater than the sentence which was imposed by the Court on the plaintiff in error. The verdict resolves in his favor from every viewpoint.

The verdict of a jury as to the weight and sufficiency of the evidence should not be disturbed unless prejudice to defendant exists, because the trial jury and the Court having the opportunity to see and observe the witnesses and their demeanor while testifying, are in better position than the appellate court to say what weight or credence should be given to the witnesses. Therefore, as the prosecuting witness does not need to be corroborated in her testimony, she not being an accomplice, the jury were the judges as to whether or not they believed her; and they evidently did believe the prosecuting witness in this case, as is indicated by their verdict.

Wherefore, by reason of the facts in this case as contained in the testimony; the fact that no objections or exceptions were taken to the testimony at the trial; the fact that only one instruction of the Court was excepted to by the defendant in the presence of the jury as the law requires, and particularly

by reason of the law, I most respectfully submit that the judgment of the Court below should be affirmed.

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